said "where there is an express warranty of the quality of an article sold, in any respect, no further warranty will be implied by the law. Thus, if a man sell a horse, and warrant it sound, and the seller knows that it is intended to carry a lady, and the horse is sound, but is not fit to carry a lady, there is no breach of warranty. With respect to any other warranty beyond that expressed, the maxim, is *expressum facit cessare tacitum*: MAULE, J., in *Dickson* v. *Zizinia*, 70 E. C. L. 602; *Parkinson* v. *Lee*, 2 East 314; *Budd* v. *Fairmaner*, 8 Bing 52."

In a sale by sample then, as a general rule, there is no implied warranty of merchantability, on the ground, *expressio unius est exclusio alterius*. But where the sale by sample is held not to be a warranty, probably there would be implied the warranty of merchantability, as was suggested by AGNEW, C. J., in *Boyd* v. *Wilson*, 83 Penn. St. 319. So also there may perhaps be implied a warranty, though one is actually expressed, from the facts and circumstances of the case, on the authority of *Mody* v. *Gregson*, L. R., 4 Exch. 49.

ARTHUR BIDDLE.

RECENT ENGLISH DECISIONS.

High Court of Justice; Queen's Bench Division.

TILLETT v. WARD.

W., a butcher, bought an ox at S. market. While his drovers were driving the ox through the streets of S., it became unmanageable, and, without any negligence on the part of the drovers, rushed into T.'s shop, and caused certain damage.

Held, that W. was not liable to T. in respect of the damage so committed.

Those who have houses adjoining a highway, whether in a town or in the country, take upon themselves the risk of inevitable accident arising from traffic on the highway.

THIS was an appeal by special case from the county court of Lincolnshire holden at Stamford.

The defendant, a butcher, purchased an ox at market, and, while the ox was being driven by his servants through the streets of Stamford, it suddenly became unmanageable, and, without any negligence on the part of the defendant or his servants, rushed into the plaintiff's shop, which was adjacent to the street, and caused damage to the extent of 1*l.*

The county court judge gave judgment for the plaintiff for 1*l.*,

holding that it was a trespass for which the defendant was responsible.

The defendant appealed.

Moon (*Graham* with him), for the defendant.

Sills, for the plaintiff.

Lord COLERIDGE, C. J.—In this case the county court judge has given us a full statement of the facts, and it is sufficient to say that he does not find that there was any negligence on the part of the owner of the ox, or of his servants. Hence we start with the fact that there was no negligence.

The following propositions of law are clear:—

First, as a general rule, the man who has cattle in his field must keep his cattle from trespassing, and if they do trespass, his neighbor, on whose land they trespass, has a right of action against the owner of the cattle, whether such trespass was or was not occasioned by negligence.

Second, when the injury is done in the high road, where the parties have a legal right to be, it must be shown that the owner of the cattle was himself guilty of negligence, or that his servant was guilty of negligence under circumstances imposing a duty on the master to use proper care. Again, if injury is done by an animal in a vicious manner, in order to render the owner liable, *scienter* must be proved.

In the present case the trespass was off the highway, the trespass having been committed by an animal off, but immediately adjoining, the highway. I find it laid down in the case of *Goodwyn* v. *Cheveley*, 4 H. & N. 631, that where a trespass is committed next the highway by cattle, without any negligence on the part of their owner, that is a trespass for which the owner is not liable. In that case the highway was in the country. It was said that this was only an *obiter dictum* in that case, but I think that, so far from being an *obiter dictum*, it was the *ratio decidendi* of the jugdment. This view was also adopted by BLACKBURN, J., in *Fletcher* v. *Rylands*, L. R., 1 Ex. 265, I could not interfere, even if disposed to do so, which I am not, with these decisions. But it is said that there is a distinction between highways in the country and streets in towns. I can see no distinction. Those who have houses adjoining streets in a market town run certain risks from cattle being driven to and

from market, and they must protect their houses and shops as best they can. Unless, therefore, there is negligence, there is no liability. Here there was no negligence, and so the judgment of the county court judge was wrong, and must be reversed.

STEPHEN, J.—I am of the same opinion. The law on the matter may be summed up thus: so long as a man has cattle on his own land, it is his duty to keep them in and protect others against their trespasses. When they are on the highway they are not trespassing, and he is not liable for damage occasioned on the highway unless the damage is brought about by the negligence of himself or of his servants. There is one other case, and that is the case of property adjacent to the highway. I agree with my lord as to the law in this case. The reason is that it is necessary for the common affairs of life to have the right to drive cattle or other animals along the road, and people must protect their property in some way. This is well-established law in the case of cattle doing injury to property next a highway in the country, and we are asked to draw a distinction between this and property adjacent to streets in towns. I do not like to draw distinctions of this sort, and on the whole, therefore, I arrive at the conclusion that the county court judge was wrong.

Judgment reversed.

This subject has received more judicial investigation in this country than in England, and these two propositions are now well established.

1. If cattle lawfully on the highway escape therefrom on to the land of an adjoining proprietor, without any negligence in the owner or his servants, he is not responsible for damage done on such adjacent land. Highways are designed for use, for the passage of animals as well as of men; and therefore if animals while properly driven on the highway, escape from the control of their keeper, and stray on to private lands, the owner is not responsible, if he uses all reasonable means to cause them to return to the highway. *Hartford* v. *Brady*, 114 Mass. 466, is a recent direct authority upon this point.

No apparent distinction exists, in this respect, between country roads and city streets. The degree of care required of the drover may be higher in the latter case than in the former; but it being proved or admitted that the proper degree of care was in fact used, the same result follows in both cases. It cannot be said exactly that the cattle are *lawfully* upon the private land in such cases (*McDonnell* v. *Pittsfield and North Adams Railroad Co.*, 111 Mass. 564); but rather that the owner is not liable for such casual and involuntary trespass. The same rule was applied in *Cool* v. *Crommet*, 13 Me. 250, where the defendant was using cattle in repairing the highway, and they escaped from his control, without his fault, and ran upon the land of the plaintiff.

2. On the other hand if cattle are *unlawfully* upon the highway, and thence

stray upon adjoining land, the owner is liable, at common law, without any proof of negligence, or want of care on his part: *Stackpole* v. *Healy*, 16 Mass. 33; *Lyman* v. *Gipson*, 18 Pick. 422. And they are unlawfully on the highway under this rule, if turned out to graze thereon by the owner; since the public have no right to use a public highway as a pasture-ground, notwithstanding a common custom to do so, in some parts of the country: *Stackpole* v. *Healey*, *supra;* approved in *Lord* v. *Wormwood*, 29 Me. 288; *Avery* v. *Maxwell*, 4 N. H. 36; *Mills* v. *Stark*, 4 Ibid. 412. It is sometimes thought that a vote of the town authorizing cattle to run at large might make such a use of the highway legal; but as the grass and herbage in the highway ordinarily belongs to the abutter, at least when, as is usually the case, he owns the fee to the centre of the road, and although he may pasture his own cows there, under the care of a keeper (*Parker* v. *Jones*, 1 Allen 270), it is difficult to see what right a town has to authorize other persons to take and carry away such owner's grass, either by cutting or grazing. That would be taking private property for private uses, and without even the show of making compensation therefor. Probably the only effect of such a municipal vote is to shield the cattle-owner from criminal or penal liability for violating a town by-law or ordinance, but not to protect him from a civil suit by the landowner injured. But however this may be, without such municipal permission, it is clear the owner is liable for the cattle's trespass upon private lands; and *at common law* this is so, although the landowner has no fences, or only insufficient fences along the highway; for at common law, as is well known, no man is bound to fence against other men's cattle; he was bound to keep his own animals in, but not to keep others out. And the statutes of many states imposing the duty of fencing upon the landowner apply only to *partition* fences between private owners, and do not require the farmer to fence along the highway. Therefore it was held in *Noyes* v. *Colby*, 30 N. H. 132, that if A. wrongfully enters the land of B., and by letting down the bars, or leaving open a gate, is the cause of B.'s cattle escaping and straying in the highway, from whence they pass to the unfenced land of an abutting proprietor, B. is liable to the latter for the damage there caused. This may appear very severe upon the innocent owner of the cattle, so wrongfully taken from his own premises, but it follows, logically, from this common-law rule, that every person must positively keep his own cattle safely on his own premises, or he is liable for their damage elsewhere. But in many states, either by force of statutes, or otherwise, the above common-law rule is not in force, and every landowner must maintain fences to keep other cattle out, and not merely to keep his own in, and consequently he has no remedy for cattle straying upon his land through the want or insufficiency of such fences. This is perfectly well established as to *partition* fences, and very possibly it may be so as to fences along the highway. If so, of course, he is remediless in such cases.

EDMUND H. BENNETT.